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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE HEARING DOG PROGRAM,

Plaintiff and Appellant,

v.

SAN FRANCISCO SOCIETY FOR THE
PREVENTION OF CRUELTY TO
ANIMALS,

Defendant and Respondent.

A126247

(San Mateo County
Super. Ct. No. PRO117561)

Eugene and Gloria Berry left 20 percent of their estate to a program operated by the San Francisco Society for the Prevention of Cruelty to Animals (SPCA) that selected and trained hearing dogs and placed them with deaf owners. Following the deaths of the Berrys in 2007, but before distribution of their bequest, the SPCA discontinued the training and placement of new hearing dogs, and reduced the scope of its hearing dog program to providing limited services and supplies for its existing graduate teams. Three former SPCA employees thereafter formed a new nonprofit charity named “The Hearing Dog Program” (HDP), which provided a full-service program modeled after the SPCA’s former program. HDP claimed it was entitled to the Berrys’ bequest on the grounds it was the successor to the SPCA program which, according to HDP, no longer existed.

Following an evidentiary hearing, the court denied HDP’s claim. HDP appealed from the ensuing judgment, which we now affirm.

I. BACKGROUND

Eugene and Gloria Berry, a married couple with no children, executed a living trust agreement in 1991, which they amended in 1995 and again in August 2007. Eugene Berry died on September 17, 2007. Gloria Berry, as the surviving trustor, executed a third amendment to the trust on September 27, 2007, and died on October 5, 2007, on which date the trust terminated.

Upon the death of Gloria Berry, the trust directed the estate be distributed as follows: “i) Twenty Percent (20%) shall be distributed to the San Francisco SPCA (Society for the Prevention of Cruelty to Animals) currently of 2500 16th Street, San Francisco, California, 94103-4213, or to its successors; [¶] ii) Twenty Percent (20%) shall be distributed to, Hearing Dogs for the Deaf, currently of 2500 16th Street, San Francisco, California, 94103-4213, or to its successor; [¶] iii) Twenty Percent (20%) shall be distributed to Guide Dogs for the Blind, with mailing address of Development Department, P.O. Box 151200, San Rafael, California, 94915-1200, or to its successor; iv) Twenty Percent (20%) shall be distributed to Dogs for the Deaf, Inc., currently of 10175 Wheeler Road, Central Point, Oregon, 97502, or to its successor; and v) Twenty Percent (20%) shall be distributed to Pets In Need, a corporation organized and existing under the California Nonprofit Corporation Law, or its successor, located at 873 Fifth Avenue, Redwood City, California 94063, to be used for such purposes as the Board of Directors thereof may deem to be for the best interests of Pets In Need. [¶] In the event a charity named in section i) through v) above is no longer in existence and does not have a successor, such charity’s share shall be distributed, in equal shares, to the other charities named in i) through v), or their successors in interest.”

At the time of the death of the surviving trustor on October 5, 2007, the “Hearing Dogs for the Deaf” program—also known as the SPCA’s “Hearing Dog Program”—was run by the SPCA as a comprehensive hearing dog program with a full-time staff that

selected, trained, and placed hearing dogs with deaf persons.¹ In the fiscal year prior to April 2008, the SPCA program employed a director, two trainers, an administrative assistant, a dog housing coordinator, and a weekend animal care attendant. The program's activities included initial dog training; the care, feeding and medical treatment for the dogs in training; canine graduation programs; the evaluation of new dogs for the program; fundraising (direct mail and speaking engagements); training and follow-up training for owners and their dogs; and supplying vests and leashes identifying dogs as hearing dogs.

In April 2008, the SPCA discontinued its comprehensive hearing dog program, terminated its employment of the program's three full-time employees, and began operating a significantly reduced program. The SPCA stopped accepting new applicants for hearing dogs and stopped selecting or training dogs to assist the deaf. It continued, however, to provide support to its graduates by providing a canine medical fund for limited-income owners of graduate dogs, in-home training and follow-up, aural exams and sound work to ensure the dogs retained their skills, and service-dog vests, leashes, and other supplies free of charge.

Based on information provided by the SPCA concerning the continued operation of its hearing dog program after April 2008, the trustee notified all beneficiaries of the trust in November 2008, that the SPCA's hearing dog program "continues to operate," and was entitled to receive the bequest of 20 percent of the residue of the estate designated for "Hearing Dogs for the Deaf, currently of 2500 16th Street, San Francisco, California, 94103-4213, or to its successor."

After April 2008, the three former SPCA employees who had staffed the Hearing Dog Program formed a new nonprofit charity named "The Hearing Dog Program" (HDP). HDP modeled its program after the comprehensive hearing dog program formerly operated by the SPCA. In December 2008, HDP contacted the trustee of the

¹ Hearing dogs are specially trained to alert their owners to important sounds in their environment such as smoke alarms, doorbells, telephones ringing, and alarm clocks.

trust claiming a 20 percent share of the Berrys' estate as "the logical successor to the [SPCA's] Hearing Dog[s] for the Deaf program," which it asserted had been discontinued in April 2008.

On December 31, 2008, the trustee petitioned the probate court for instructions as to whether the 20 percent bequest for "Hearing Dogs for the Deaf" should be distributed to the SPCA. HDP petitioned the same court on January 22, 2009, asserting a claim to the same 20 percent share either as successor in interest to the Hearing Dogs for the Deaf program formerly operated by the SPCA or under the equitable *cy près* doctrine.² HDP argued the SPCA was no longer operating its program, but HDP's own program was the one that "most closely resembles that intended by the [settlers] when they made the bequest."

The SPCA submitted briefing and argument supporting the trustee's petition and opposing HDP's petition. The SPCA argued that (1) its interest in the estate vested on the date of Gloria Berry's death and events after that date were irrelevant; (2) the April 2008 reduction in the program's scope was irrelevant because the program had not terminated; (3) HDP had no valid claim to be the "successor" to the SPCA's allegedly terminated program because it was legally unrelated to and unaffiliated with the SPCA's program, nor had it succeeded to any rights or assumed any obligations of the SPCA's program; and (4) no *cy près* argument applied because there was no ambiguity as to the identity of the bequest's intended recipient, and the purpose of the trust would best be fulfilled by distributing the bequest to the named beneficiary.

The probate court conducted an evidentiary hearing on the issue of whether the SPCA was still operating a hearing dog program. The court stated, "[A] specific inquiry into the donor's intent as to whether they were referring to a full service program . . . I think is . . . probably beyond the purview of this court. We [are] held to the language of

² Under the *cy près* doctrine, "[w]here compliance with the literal terms of a charitable trust became impossible, the funds would be put to 'the next best use,' in accord with the dominant charitable purposes of the donor. [Citation.]" (*State of California v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 472.)

the document which means I need to look and see whether this program is being [run] by the SPCA.” The court specifically reserved the issue of whether HDP could rightfully claim to be the successor to the SPCA’s program, stating, “[I]f the court found that The Hearing Dog Program of the SPCA was not currently being operated, then we would have to deal with successor status.”

The SPCA’s president testified at the hearing that after operating for 30 years and graduating 800 dogs, the SPCA reduced the scope of its program in 2008 to provide continuing support (including equipment, emergency and wellness veterinary care, and additional training) for over 200 working teams utilizing its graduates—but would no longer accept applications for hearing dogs or train new hearing dogs. The program continued to have a budget and SPCA employees continued to have responsibilities for operating it. The SPCA’s executive assistant testified the program was currently operating and 66 clients had contacted the SPCA for various types of assistance between April 2008 and the date of the hearing. The SPCA’s vice-president testified she was the director of the Hearing Dog Program and described her duties.

HDP introduced a copy of an article published in the summer 2008 issue of an SPCA publication co-authored by the SPCA’s president in which she explained the SPCA had “made the difficult decision to discontinue The Hearing Dog Program” because other agencies focused on hearing dog training and placement could do the job more effectively, and the SPCA’s limited resources were better utilized on its core missions, including veterinary and adoption services for homeless companion animals.³ HDP also introduced evidence the SPCA did not craft a budget for its reduced hearing dog program until well after the inception of its customary fiscal year, at a time when this litigation was already underway. The \$114,000 per annum budget earmarked \$14,000 for operating the program and \$100,000 for attorney fees for this litigation.

³ The article also stated that assistance, including offsite training, would continue to be offered to existing SPCA hearing dog teams.

HDP offered expert testimony the SPCA's program did not satisfy the criteria for accrediting hearing dog programs established by Assistance Dogs International (ADI) (a professional society involved in establishing industry standards) because it no longer accepted applications or trained new dogs.⁴

The court initially observed the SPCA had put itself in an awkward position by adopting board minutes and sending out notices stating it had discontinued the program and then having to argue it had not in fact discontinued the program in order to be qualified to receive the bequest. The court nonetheless concluded that because the evidence established the SPCA program was still providing services, and had a budget, administrator, and staff, the SPCA had met its burden to show they were still running an ongoing hearing dog program. In so holding, the court stated: "I think the bar, to be honest with you, is pretty low about the extent of a program they have to operate to qualify for the funds." The court therefore denied the petition to allocate the funds other than to the SPCA. HDP timely appealed from the ensuing judgment.

II. DISCUSSION

HDP contends the trial court erred in (1) failing to properly interpret the bequest; (2) refusing to apply the equitable doctrine of *cy près*; (3) if the *cy près* doctrine did not apply, failing to construe the bequest in favor of HDP under the reasoning of *Estate of Jackson* (1979) 92 Cal.App.3d 486; and (4) limiting pretrial discovery and refusing to allow HDP to offer certain evidence as to its program and the motives of the SPCA in allegedly "reviving" its hearing dog program after discontinuing it.

A. Interpretation of the Bequest

HDP argues the trust language, "Hearing Dogs for the Deaf, currently of 2500 16th Street, San Francisco, California, 94103-4213, or to its successors," means "if, at the time of distribution of the bequest, there was no hearing dogs for the deaf program at 2500 16th Street . . . , the bequest would be distributed to the successor of that program."

⁴ The SPCA responded with testimony that it had run its program for 28 years without accreditation before first being accredited by ADI in 2006, and that no law required such accreditation.

According to HDP, the phrase “Hearing Dogs for the Deaf” meant a “full-fledged program using service dogs to assist the deaf,” requiring a program that accepted human applicants, and selected dogs for training and matching with deaf clients. In contrast, as the court made clear, it did not construe the trust instrument to require that the SPCA continue to operate the same, full-service hearing dog program it was operating at the time of Gloria Berry’s death in order to qualify for a bequest, only that it be operating *some* type of hearing dog program.

Where there is no conflicting extrinsic evidence of the testator’s intent, we review the probate court’s interpretation of the language in a will or trust de novo. (*Estate of Dodge* (1971) 6 Cal.3d 311, 318.) The court’s guiding principle in determining the settlor’s intent must, if possible, be the intent as expressed by the language of the instrument itself. The test must be what the settlor intended by what was said, rather than what he or she intended to say. (*Kropp v. Sterling Sav. & Loan Assn.* (1970) 9 Cal.App.3d 1033, 1044–1045.) Where the words creating a trust are clear, intelligible and explicit, and do not involve an absurdity, the court cannot fashion a new instrument for the parties. (*Marsh v. Home Fed. Sav. & Loan Assn.* (1977) 66 Cal.App.3d 674, 684.) Construction of the instrument depends on the settlor’s intent at the time of execution as shown by the face of the document, not on any wishes, desires, or thoughts after the event. (*Mummert v. Security-First Nat. Bank* (1960) 183 Cal.App.2d 195, 199.) The paramount rule in construing a trust instrument is to determine intent *from the instrument itself* and in accordance with applicable law. (*Brown v. Labow* (2007) 157 Cal.App.4th 795, 812.)

In this case, we find HDP reads conditions into the bequest not supported by its plain language. The words used were intended to *identify* the hearing dog program operated by the SPCA that was to receive the bequest and thereby to distinguish it from other programs operated by the SPCA at that address, other service-dog programs receiving separate bequests, and other programs with similar names that were not intended by the settlors to receive bequests. The words “currently of 2500 16th Street . . .” were intended to identify the program by its then-current address, not to eliminate

the bequest if the SPCA moved its program to a different address. Nothing in the language of the bequest purports to set conditions or minimum standards that the SPCA's hearing dog program was required to meet in order to receive its 20 percent bequest, save that the program still exist or have a legal successor. In particular, the instrument says nothing to indicate the settlors intended the bequest to default to a successor if the program reduced its scope, no longer met the requirements for accreditation by ADI, or no longer offered comprehensive services, including accepting new human applicants and training new hearing dogs. It is possible the Berrys might have wanted such stipulations had they thought about the matter, but nothing in the language they used suggests they did think about what should happen if the program they identified no longer trained or placed new hearing dogs. Reading such intentions into the trust language would be no more than idle speculation. Our task is to construe the intentions of the settlors as expressed in the words they used, not to guess at what they might have intended to say had they considered different possible scenarios.

In our view, the probate court therefore correctly held the sole issue was whether the SPCA continued to operate a hearing dog program in some form after April 2008.⁵

B. *Application of Cy Près Doctrine*

Under the equitable doctrine of *cy près*, when compliance with the literal terms of a charitable trust becomes impossible, the court will put the trust funds to the next best use consistent with the donor's dominant charitable intent. (*In re Microsoft I-V Cases* (2006) 135 Cal.App.4th 706, 716.) The *cy près* doctrine may not be applied unless it is permanently impossible or impractical to carry out the specific charitable purpose or purposes of the creator of the trust. (*Estate of Mabury* (1976) 54 Cal.App.3d 969, 985.)

⁵ The SPCA maintains that the bequest vested immediately upon Gloria Berry's death. If so, the issue of whether it continued to exist after April 2008 was immaterial to the resolution of HDP's petition since it was undisputed that the SPCA's hearing dog program was fully operational in October 2007. (See *Salvation Army v. Price* (1995) 36 Cal.App.4th 1619, 1624.) We do not reach this issue and express no opinion on it.

We do not find the *cy prè*s doctrine applicable here. It was not impossible or impractical to carry out the settlors' intent as expressed in the trust. First, the charitable donee named in the trust did still exist and continued to operate a hearing dog program after April 2008. This immediately distinguishes this case from *cy prè*s cases such as *Estate of Tarrant* (1951) 38 Cal.2d 42, in which the charitable donee named in the trust did not exist. (*Id.* at p. 49 [bequest to “ ‘Pension Fund of the Great Northern Railway Company,’ ” which did not exist, given to “Veterans Association of the Great Northern Railway Company,” which administered pension fund].) Second, even assuming for the sake of analysis that “Hearing Dogs for the Deaf” as referenced in the trust did not exist on the relevant date and had no legal successor, the trust expressly provided for distribution of that program's 20 percent share among the other named entities. Since the trust already specifies an alternative disposition in the event one of the named charities did not exist, application of the *cy prè*s doctrine would still not be necessary in order to fulfill the settlors' charitable intent. (See *Estate of Klinkner* (1978) 85 Cal.App.3d 942, 952.)

The probate court did not err in refusing to apply the *cy prè*s doctrine.

C. Application of Estate of Jackson

HDP contends in the alternative that if the *cy prè*s doctrine was inapplicable, *Estate of Jackson* supplied a relevant precedent the court should have followed in construing the trust.

Estate of Jackson involved a bequest to “ ‘the heart fund,’ ” without further identification of the intended recipient. (*Estate of Jackson, supra*, 92 Cal.App.3d at p. 488.) The Court of Appeal held the *cy prè*s doctrine did not apply because “from the evidence before the [trial] court, it was possible to distribute the residue to ‘the heart fund’ as the decedent requested.” (*Id.* at p. 490.) The appellate court found extrinsic evidence sufficiently established the testator's intent that the bequest go to the American Heart Association (AHA). (*Ibid.*) Specifically, there was considerable evidence showing the AHA was generally known and recognized as the “ ‘Heart Fund.’ ” (*Id.* at pp. 490–491.) The AHA had registered that name with the patent office and used the name on its

stationery and other printed material distributed to the public. At the same time, no evidence had been presented that the competing charitable claimant ever used or was known by that name. (*Id.* at p. 491.) Thus, in the court’s view, any ambiguity about the testator’s intent was resolved by extrinsic evidence of the testator’s intent. (*Id.* at p. 492.)

Estate of Jackson has no application here. There was no ambiguity about whether the Berrys intended HDP or the SPCA’s hearing dog program to be the recipient of the bequest in issue. HDP did not even exist until a year after Gloria Berry died. The SPCA’s program was clearly identified as a beneficiary by its name and street address in the trust instrument. *Estate of Jackson* has no bearing on the determination of this case.

D. Discovery Limits and Evidentiary Rulings

HDP complains it was not allowed to conduct full-blown discovery. The court did require the SPCA to produce documents relevant to the nature of the program being run by the SPCA, but HDP asserts it objected to this limitation and sought wider discovery. HDP further objects it was not allowed to present or elicit certain evidence including (1) testimony by HDP’s director about the nature of its program and the circumstances of his departure from the SPCA in April 2008; (2) evidence of the funds accumulated by SPCA for its hearing dog program that were assertedly far in excess of its program spending of \$14,000 per annum; and (3) cross-examination of SPCA’s director as to the amounts actually being spent on support of graduate teams, SPCA’s core mission, and the qualifications of the SPCA staff who were terminated as a result of the April 2008 reduction in the scope of the program. According to HDP, the cumulative effect of the sustained objections was to prevent HDP from offering evidence reflecting on SPCA’s true motives for “reviving” the hearing dog program, namely, to create evidence for use in this proceeding that the program was still staffed and running.

We review the court’s discovery and evidentiary rulings for abuse of discretion. (See *Save Open Space Santa Monica Mountains v. Superior Court* (2000) 84 Cal.App.4th 235, 245–246; *Gordon v. Nissan Motor Co., Ltd.* (2009) 170 Cal.App.4th 1103, 1111.)

We find HDP failed to preserve its objection regarding the scope of discovery and fails to specify what discovery it would have conducted that might have affected the

outcome of this proceeding. In the probate court, HDP merely requested it be allowed to conduct “some discovery” as to the nature of the SPCA program, if any, that continued after April 2008. HDP’s counsel stated he wanted to “get the records that would show the program has been run.” The court agreed with this request. We do not find any objection on the record to the scope of discovery the court allowed. The portion of the record HDP cites as constituting its objection to the scope of discovery arises later in a different context, and cannot reasonably be construed as an objection to the scope of discovery. In any event, HDP offers no evidence or argument from which we could conclude it sought discovery that, if allowed, would have affected the outcome of the proceedings.

We also find no abuse of discretion in the court’s challenged evidentiary rulings. Based on the language of the trust, the issue before the court was whether the SPCA continued to operate a hearing dog program of some kind after April 2008. The nature of HDP’s program was not relevant and the trial court did not abuse its discretion in excluding the testimony of HDP’s director on that issue. We find no indication at the portion of the record referenced by HDP that it sought to elicit evidence from its director about the circumstances of his departure from the SPCA. There was also no abuse of discretion in excluding evidence of the amount of funds available to finance the SPCA’s reduced hearing dog program. Whether the program was adequately, or more than adequately, funded without the Berrys’ bequest was not relevant to the issue before the court.

Similarly, objections to questions concerning the amount the SPCA was expending on the program, the organization’s core mission, and the qualifications of its former staff were properly sustained as irrelevant or cumulative. Although HDP complains it was not allowed to fully develop its case that the SPCA “revived” its program after it learned of the Berrys’ bequest, HDP was in fact allowed considerable leeway to present and elicit evidence on that issue. However, since the evidence was undisputed the SPCA program existed on the date of Gloria Berry’s death and continued to exist, albeit in reduced scope, after April 2008, the extent to which the Berrys’ bequest

motivated the SPCA's actions in 2008 and 2009 is immaterial. Whatever the SPCA's motivations, distributing the Berrys' bequest to its hearing dog program carries out their expressed intent.

The probate court committed no prejudicial error in limiting discovery or ruling on the admissibility of evidence.

III. DISPOSITION

The judgment is affirmed.

Margulies, J.

We concur:

Marchiano, P.J.

Dondero, J.